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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1672

JOHN L. LEA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A, pages A1-A10) has not yet been officially reported.

JURISDICTION.

The decision of the Court of Appeals was rendered on February 19, 1980 (Appendix B, page A11). A timely petition for rehearing was denied on March 24, 1980 (Appendix C, page A12). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a scheme to deprive an employer of the honest and faithful services of an employee constitutes a fraud cognizable under the mail fraud statute without proof of tangible loss or injury to the employer and without proof that harm to the employer was contemplated by the employee.

2. Whether mail use that is necessary and proper in the conduct of routine and innocent business procedures carried on by legitimate businesses warrants conviction under the mail fraud statute even though the contents of the mailed material contain no falsehood or misrepresentation, the alleged victim of the fraud suffers no pecuniary loss or injury, and the precise relationship of the mailings alleged in the indictment to the scheme pronounced by the Court is not established.

3. Whether the admission in a criminal jury trial of testimony of prior "bad acts" occurring twelve years before trial under Rule 404(b) of the Federal Rules of Evidence that is acknowledged prejudicial to the defendant is justified by an alleged need to establish character, motive or intent and therefore not in conflict with Rule 403 of the Federal Evidence Rules.

STATUTES INVOLVED.

The mail fraud statute, 18 U. S. C. § 1341, provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 403, 28 U. S. C., of the *Federal Rules of Evidence* provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404, 28 U. S. C., of the *Federal Rules of Evidence* provides as follows:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE.

After verdict favorable to petitioner in civil proceedings instituted by Safeway Stores Incorporated (Safeway), the present criminal proceedings, in twenty counts, were begun for violation of 18 U. S. C. § 1341, the federal mail fraud statute. In this action, petitioner was found guilty by the jury on each count of the indictment and was sentenced to two years imprisonment on each count to run concurrently and fined the sum of $1,000.00 on each of Counts 1 through 10 for a total of $10,000. (T. 585, 594-596) The conviction was affirmed by a majority of the Court of Appeals for the Seventh Circuit.

Petitioner's Employment with Safeway:

In terms of sales volume, Safeway is the largest supermarket chain selling meat and groceries throughout the United States. With two exceptions, this company operates west of the Mississippi River and maintains over 2,000 stores. Meat products are purchased for Safeway through branch buying offices that are responsible for furnishing the stores in their geographic locale and occasionally for outlets in other areas whose buying offices are unable to fill their needs. Generally, meat is purchased in wholesale form from suppliers who transport the goods to Safeway warehouses where it is prepared for delivery to individual stores. (T. 40-43)

Petitioner was employed as manager and purchasing agent in the meat buying department of the Midwest Branch office of Safeway. During the times relevant to this litigation, the Midwest buying office was located in Chicago until May of 1971 when the office was moved to Prairie Village, a suburb of Kansas City. As purchasing agent, some of the products petitioner purchased for Safeway were ordered through Mutual

Brokerage Service Incorporated (Mutual), located in Chicago, whose stockholders and operating managers, for most of the period covered by the indictment, were William Horwich (Horwich) and Allen Petlin (Petlin). The record did not identify all suppliers dealt with by petitioner who were not represented by Mutual nor does the record identify any other broker. The indictment alleged that from 1965 to March of 1975, at Chicago, and elsewhere, petitioner received monies from Petlin and Horwich for Safeway business.

General Buying Procedures Used by Safeway and Mutual:

Safeway used an offer and acceptance method of buying. Essentially, Safeway furnished specifications to suppliers, and prospective suppliers, who were invited to make offerings to regional buying offices. These offerings were either accepted or rejected. (T. 38, 44-45) The Midwest Branch would receive numerous daily telephone offerings from various meat suppliers, and Mutual, advising as to the price, quality and availability of their products. (T. 49-50, 416-417) These offerings were taken by petitioner and various members of his staff. (T. 250-251, 413) Depending on current market prices and the needs of the various stores, meat products would be purchased through return telephone calls by petitioner or other members of his buying staff. (T. 50, 250, 253, 259, 263, 283) Subsequently, purchase orders, confirmations, invoices, brokerage statements and payment checks would be prepared and mailed. Safeway paid the suppliers directly while those suppliers whose sales had been generated by Mutual paid commissions directly to this broker. With regard to Mutual, petitioner and other members of his staff received its offerings and, if accepted, petitioner, or others, would notify Mutual. Petitioner used Mutual more than other members of his staff and more than was normally used by other branch offices of Safeway. (T. 62-64, 72-73, 251-252, 259, 263-264, 283, 285-287)

Offerings coming into the Midwest Branch were recorded by petitioner and other buyers in that office on a work sheet/offering sheet. When offerings were accepted, the supplier, or where appropriate, Mutual, would be advised by phone and given a purchase order number. (T. 49-50, 70-71, 253) Subsequently, purchase orders, in multiple copies, would be prepared and mailed by the buying office. One copy was retained by the buying office while several copies were mailed to Safeway and its various divisions. When a broker was not used by a supplier, a copy of the purchase order was mailed directly to the supplier. On sales generated by Mutual, a copy of the purchase order was mailed directly to Mutual. In all instances, the purchase orders contained the name of the supplier. (T. 37, 51-54, 290-297, 439-441)

In sales through Mutual, this broker, upon receipt of the purchase order, would prepare and mail confirmations of the sale to the supplier and the Safeway branch buying office. In all instances, suppliers prepared their own invoices. Mutual also prepared brokerage statements which were mailed to its suppliers who paid Mutual directly. Safeway paid the suppliers directly by mail.

In addition to the purchase orders, the buying office was required by the company to mail periodically to the head office a form known as MB-4. This form contained all offerings received and accepted. (T. 37, 55-56, 81, 111, 255, 257, 263, 414-416) While there was testimony indicating that Mutual "should" have been designated on both the purchase orders and MB-4's mailed by the buying office to Safeway (T. 51-52, 263), there was no evidence introduced that mandated that designation. At one period, Mutual had been designated on the purchase orders and then it was omitted. (T. 320) The Government did introduce evidence that petitioner told his clerical staff and his buying associates not to designate the broker on the forms sent to the head office. (T. 257, 415-416, 441) Neither the purchase orders nor the MB-4's contained columns for the

identification of brokers. (T. 302) Petitioner's supervisor stated that petitioner did not know that Mutual's designation was required. When told to include designation of the broker in July of 1974, thereafter Mutual was always identified. (T. 88, 115, 117) There was no written Safeway policy that brokers should be designated on purchase orders or MB-4's. (T. 279-280) Petitioner's secretary stated that she was not aware of any company policy that required the broker to be identified in those forms sent to the head office. (T. 304) When Safeway began its investigation of petitioner, all purchase orders maintained in his office and all sales confirmations sent by Mutual were properly maintained at his buying office. In any event, MB-4's and purchase orders were omitted in the indictment. (T. 116) Petitioner was discharged by Safeway on February 20, 1975. (T. 76) At all times relevant to this litigation, there was no Safeway policy that brokers should not be used. (T. 104-108, 78-280, 287-288)

Official Safeway Policies and Procedures:

Safeway's basic buying policies were:

"1. Deal fairly with all suppliers in contracting for supplies. Questionable dealings with suppliers positively will not be tolerated. Honesty and fair dealings are the only means of acquiring the confidence of those with whom the company deals.

2. See that terms of all contracts are adhered to by both the company and its suppliers.

3. Never disclose one supplier's price quotation to another supplier to obtain a lower price. Any employee indulging in this practice is subject to immediate dismissal.

4. Refrain from sharp practices and chiseling tactics.

5. Accept no gifts or favors, either directly or indirectly, from anyone doing or seeking to do business with the company. Any employee who violates this policy is subject to immediate dismissal. In addition, the company may require him to account to it for the value of whatever he receives.

6. Pay prevailing market prices for all commodities, taking into consideration the following factors: (a) grade and quality; (b) quantity purchased; (c) method of sale and delivery.
7. Strive to eliminate uneconomic methods of distribution and wherever possible purchase in full transportation units from one point of manufacture to one point of unloading." (T. 46-49)

Additionally, Safeway's policy with regard to brokers provided:

"1. The company's buying shall be conducted in such a manner as to conform with the wishes of the seller. This specifically means that, number one, if the seller elects to deal through brokers, the company shall deal through the brokers designated.
2. If the seller elects to deal directly, the company shall follow that method. Safeway, however, will never seek to deal directly with a manufacturer or seller for the purpose of eliminating the use of a broker. As a general rule, a seller who employs no broker cannot involve himself or those who buy from him in a violation of the Brokerage Section of the Robinson-Patman Act." (T. 57-60)

On October 15, 1969, petitioner signed a conflict of interest statement that provided that for a period of five years preceding his signature to this document neither he nor any member of his family received any gift or gratuity from any supplier to the company or a supplier's representative or any concern or individual doing business or seeking to do business with Safeway. On this document, petitioner acknowledged and understood that his relationship to the company was fiduciary and that he owed Safeway a continuing duty of loyalty and good faith. (T. 67-69)

Payments Allegedly Received by Petitioner from Horwich and Petlin:

Under a grant of immunity, both Petlin and Horwich testified for the Government. Both witnesses, and Mutual, had previ-

ously been dismissed as defendants in civil litigation brought against them, Mutual, and petitioner by Safeway. This civil litigation had ended prior to the commencement of the criminal trial. (T. 126, 242-246, 342-347)

At trial, Petlin and Horwich testified that Mutual was organized in July of 1964 with a number of silent partners. While they conducted the day-to-day business of this corporation, four other persons maintained interests in this business until their shares were purchased in July of 1969. (T. 118-120, 139, 305-306)

After a conversation with their associates in September of 1966, Petlin and Horwich began making cash payments to petitioner. These payments allegedly continued for the next eight years. Payments were made to petitioner in cash personally by Horwich or Petlin. (T. 128-136, 308-310) During this period, approximately $29,250 was given in cash to petitioner. During this period, Mutual earned commisions on sales to Safeway of approximately $547,000. (T. 229-230, 318, 346, 449, 465)

The first payment was given to petitioner on or about September 16, 1966. On that occasion, a Mutual check was drawn payable to one of the silent partners who in turn cashed the check. This cash, in the sum of $400, was allegedly paid personally to petitioner. (T. 134, 162) Thereafter, additional payments were made. (T. 145, 313-314) From 1967 to 1969, Mutual's accounting records identified these checks as loan checks or bonus checks. (T. 143-144, 311) This designation was used to identify the purpose of the payment to the other partners. No accounting was ever given to the other partners concerning these payments. (T. 138) During this period of time, cash was always given personally to petitioner by Petlin or Horwich after checks, designated as loan or bonus checks on the disbursement ledger, had been cashed by either of them. (T. 137) After the other partners were bought out, the payment procedure was slightly modified. After 1969, two consecutive loan or bonus checks were made payable to Petlin and Horwich

who then cashed the checks. At least one-half of the total sums represented by these checks would be paid by either Petlin or Horwich to petitioner. These witnesses testified that the amounts of these loans would be paid back to the corporation and identified as income on which taxes would be paid. The payments were not made on any regular basis nor at any set time nor were the payments computed on any fixed percentage of sales to Safeway. (T. 136-182, 196-215, 227-228, 311, 314, 325-338) All sums received by Mutual in the conduct of its brokerage business, including all commissions earned on sales to Safeway, were deposited into a single business checking account. (T. 189, 194-196, 214-215, 336) The loan and bonus checks were drawn on this account. On occasion, these Mutual checks, instead of being cashed, were deposited by Petlin and Horwich into their personal accounts. Subsequently, checks drawn on these personal accounts would be cashed by them. (T. 143) In each instance, Petlin and Horwich determined what, if anything, to pay petitioner. None of the payments were made to petitioner pursuant to any formula or percentage or agreement based on specific Safeway business. (T. 145-149, 198-200, 213-214, 227-228, 313-314, 325-331, 337-338)

Other Evidence Presented at Trial:

Petlin, Horwich and other buyers in petitioner's office stated that petitioner, on occasion, would discuss over the phone market prices and conditions concerning products Safeway was interested in buying. The dates, frequency, participants and specific transactions involved in these phone conversations was not established. From the nature of the business, however, there were occasions when it was appropriate to discuss market conditions with individuals and firms making offerings to the Midwest Branch. (T. 185-186, 240-242, 319-320, 418-419, 421, 427)

There was also testimony that two suppliers did not place much direct business with Safeway until they used Mutual as

their agent. In each instance, these suppliers stated that they were contacted by Mutual. While no specific date or transaction was ever established, these suppliers testified that their success in selling to Safeway increased after they retained Mutual. One witness testified, over objection, that some ten to twelve years before trial, the petitioner had indicated to him that he would have to be paid to accept that broker's offerings. (T. 386-390)

The Government's summary witnesses testified that in 1974, 67.44% of Mutual's business was with Safeway. In that year, Mutual's earnings on sales placed with Safeway was $99,000. Mutual's total earned commissions in that year was $147,000. Mutual's business with safeway had increased, on a percentage basis, each year during the period alleged in the indictment. (T. 448-449)

Consequences to Safeway Regarding the Sums Allegedly Paid by Petlin and Horwich to Petitioner:

The evidence adduced at trial established that Safeway did not object to buying from Mutual if it saved money. (T. 284) The price and quality of the merchandise purchased by petitioner was always appropriate to market conditions and Safeway's needs. (T. 103, 282, 284, 425) He never bought at a higher price from Mutual. (T. 111) When the price and quality of the product offered by Mutual was not appropriate, petitioner would not accept Mutual's offerings. (T. 238-239)

In closing argument, the Government admitted that it did not dispute the fact that petitioner got the very best price he could for Safeway. The Government stated that it never contended that he bought at higher prices. (T. 539-560) All commissions earned by Mutual were legitimate. (T. 557)

The Indictment:

Petitioner was charged, together with Horwich and Petlin who were not named as defendants, with knowingly and willfully

having devised and intending to devise a scheme and artifice to defraud Safeway of the following:

1. Its right to have its business and affairs conducted honestly free from undue influence and conflict of interest;
2. Its right to the conscientious, loyal disinterested and unbiased services of petitioner in his capacity as manager and purchasing agent free from corruption, partially, willful omission, misconduct, conflict of interest and fraud; and
3. Certain secret profits obtained by petitioner in the performance of his official duties for Safeway.

While the indictment charged that the fraud began in 1965 and continued until March of 1975, with the exception of two mailings that occurred in January and March of 1975, the remaining eighteen counts alleged mailings in 1974. It was charged that for the purpose of executing the scheme and attempting to do so, petitioner knowingly and willfully caused to be placed in the mails and delivered by the Post Office the following:

1. Brokerage statements from Mutual to E. W. Kneip, Rochester Independent Packers, Inc., Aurora Packing Company, Kansas Beef Industries, and Central Meat Company;
2. Confirmations of sale from Mutual to Central Meat Company and the Midwest Branch of Safeway; and
3. Packer checks from Central Meat Company, E. W. Kneip, B&B Packing Company, and Rochester Independent Packers, Inc. to Mutual.

The indictment charged twenty counts based on the individual documents described above. Each document was the basis of a count in the indictment. The indictment is reproduced as Appendix D, pages A13-A20.

REASONS FOR GRANTING WRIT

I.

THE HOLDING OF THE COURT OF APPEALS THAT A SCHEME TO DEPRIVE AN EMPLOYER OF THE HONEST AND FAITHFUL SERVICES OF AN EMPLOYEE CONSTITUTES A FRAUD COGNIZABLE UNDER THE MAIL FRAUD STATUTE WITHOUT PROOF OF TANGIBLE LOSS OR INJURY TO THE EMPLOYER AND WITHOUT PROOF THAT SUCH HARM TO THE EMPLOYER WAS CONTEMPLATED BY THE EMPLOYEE NOT ONLY CONFLICTS WITH CURRENT DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL BUT ALSO EXPANDS THE STATUTE BEYOND ALL REASONABLE LIMITS.

The concept that a Section 1341 prosecution can be maintained in the context of a breach of duty has recently been used to prosecute public figures for accepting bribes to act in breach of their obligations toward their constituents. However, even in this context, the doctrine has been rejected where a public employee accepted "gratuities" that did not affect the performance of his duties. *United States* v. *McNeive* (Eighth Circuit, 1976), 536 F. 2d 1245, 1249-1252. As expressly stated in *United States* v. *Dixon* (Second Circuit, 1976), 536 F. 2d 1388, 1398-1401, this concept should not be extended into private relationships. More importantly, these concepts should not be extended when the alleged victim of the fraud suffers no tangible loss or injury and no harm is contemplated.[1] *United States* v. *Rabbitt* (Eighth Circuit, 1978) 583 F. 2d 1014, 1024-1026.

In *McNeive,* that Court explored the history of the use of Section 1341 to prosecute schemes which deprived individuals

1. See Statement of the Case, Consequences to Safeway Regarding the Sums Allegedly Paid by Petlin and Horwich to Petitioner, page 12 of this brief.

of intangible rights or interests. Beginning in the arena of political and civil rights, the concept has now been extended to prosecute recreant employees. However, in each instance in which the doctrine has been applied in private relationships, the victim of the scheme had suffered actual, tangible, pecuniary injury.[2] *Epstein* v. *United States* (Sixth Circuit, 1949), 174 F. 2d 754, 767; *United States* v. *Regent Office Supply Company* (Second Circuit, 1970) 421 F. 2d 1174, 1180; and *McNeive* pages 1249-1250. While the doctrine may well be justified to guard significant and, in the words of *McNeive*, "often constitutionally protected intangible rights," surely Safeway is not cloaked with such public importance that its employees may be prosecuted in federal criminal proceedings on felony charges when they act in breach of employment obligations that cause Safeway no tangible injury and when in the performance of their duties no harm to Safeway was even contemplated.

Section 1341 prohibits "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." While it can be argued that the phrase "or for obtaining money or property" modifies and limits the preceding phrase "any scheme or artifice to defraud," the Appellate Court impliedly held that the two phrases should be read in a disjunctive sense as prohibiting two distinct

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2. This is particularly true in the cases cited by the Court of Appeals in its opinion in support of the proposition that pecuniary loss is not an essential element of the crime of mail fraud. (Opinion, Appendix A, footnote 3, page A5) Of the cases cited, only *United States* v. *George* (Seventh Circuit, 1973) 477 F. 2d 508 *cert. denied* 414 U. S. 827 deals with breach of duty by an employee. In *George*, the victim of the fraud did suffer actual monetary loss. See *McNeive* page 1250. In *United States* v. *Reicin* (Seventh Circuit, 1974) 497 F. 2d 563 *cert. denied* 419 U. S. 996, an attorney and a medical doctor devised a scheme to defraud insurance companies in personal injury actions through submission of false and exaggerated reports, bills and employment time-loss statements to increase damages. The Court held in *Reicin* that *success* of the scheme was not an essential element of the crime. In *United States* v. *Reid* (D. C. Circuit, 1976) 533 F. 2d 1255 false invoices were approved and sent. In this case the victim paid double the amount actually due.

types of conduct, that is, schemes to defraud and schemes to obtain money or property fraudulently. The fraud was defined by the Court as a scheme to deprive Safeway of the honest and faithful services of its employee. The Court further held this conduct cognizable under the statute without proof of pecuniary loss to Safeway and without proof that harm to Safeway was even contemplated.[3] This interpretation expands the statute to new and unreasonable limits. Since only a "scheme to defraud" and not actual fraud is required for conviction, this language has been interpreted to mean that it is not essential that the Government allege or prove that the scheme *succeeded* and the victim was in fact defrauded. This part of the statute does not mean, however, that the Government can escape the burden of showing that actual tangible harm or injury either occurred or was contemplated by the petitioner to the victim alleged in the indictment. *Regent Office Supply Company,* pages 1180-1181.

The Indictment alleged that petitioner received monies from Petlin and Horwich for Safeway business. (See Appendix D, pages A13-A20.) Though petitioner was alleged to have benefited from his employment in a reprehensible way, this conduct neither tangibly injured Safeway nor affected the performance of his duties.

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3. The trial judge instructed the jury over objection as follows: "If you should find beyond a reasonable doubt that the defendant, John L. Lea, accepted monies and kickbacks from Mutual Brokerage Service Inc. while acting as purchasing agent for Safeway Stores Incorporated, then you may find that the defendant engaged in a scheme to defraud Safeway of its right to John L. Lea's loyal and faithful services although no actual monetary loss to Safeway need be shown."

II.

THE HOLDING OF THE COURT OF APPEALS THAT MAIL USE THAT IS NECESSARY AND PROPER IN THE CONDUCT OF ROUTINE AND INNOCENT BUSINESS PROCEDURES CARRIED ON BY LEGITIMATE BUSINESSES WARRANTS CONVICTION UNDER THE MAIL FRAUD STATUTE EVEN THOUGH THE CONTENTS OF THE MAILED MATERIAL CONTAIN NO FALSEHOOD OR MISREPRESENTATION, THE ALLEGED VICTIM OF THE FRAUD SUFFERS NO PECUNIARY LOSS OR INJURY, AND THE PRECISE RELATIONSHIP OF THE MAILINGS ALLEGED IN THE INDICTMENT TO THE SCHEME PRONOUNCED BY THE COURT IS NOT DEFINED, EXPLOSIVELY EXPANDS THE PARAMETERS OF THE FEDERAL MAIL FRAUD STATUTE AND CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT AND THE OPINIONS OF OTHER CIRCUIT COURTS OF APPEAL.

In the context of the federal mail fraud statute, must every use of the mails alleged in the indictment be connected to the scheme charged by the Government or can *any* use of the mails, irrespective of its specific link to the fraud and irrespective of its precise association with petitioner, satisfy the requirements of the statute and warrant conviction? Is proof of fraud alone sufficient to sustain a prosecution under § 1341 without evidence of mail use proximately connected to that fraud?

The Court defined the precise elements of the scheme to defraud specifically as follows:

1. Petitioner's disclosure of competitor offers or Safeway's anticipated future requirements; or
2. Petitioner's directing Mutual to specific suppliers that he believed would allow Mutual to offer a more competitive price; or
3. Petitioner's rejection of offers similar in price and quantity to those tendered directly by suppliers and subsequently accepted when placed through Mutual. (Opinion, Appendix A, page A3)

However, after having defined the scheme, the Court did not explore the precise relationship of each individual mailing charged in the indictment to these activities. Reasoning that the purpose of the fraud was to secure money for both Mutual and petitioner, the Court determined that the scheme successfully established Mutual as a conduit for funds, some of which were allegedly paid to petitioner. Therefore, an indispensable element of the fraud was Mutual's mailings of confirmations and brokerage statements, and the suppliers' mailings of commission checks. These uses of the mail were critical because funds flowed into Mutual as a proximate result of their use. Obviously, if Mutual does not place orders, neither they nor petitioner receive any money. Consequently, *any* confirmation, brokerage statement or supplier check generated by Mutual with regard to *any* Safeway business is connected to the fraud irrespective of the facts of a particular transaction, that is, irrespective of the individual who received or accepted Mutual offerings and irrespective of whether that offering was tainted, in any manner, by any element of the scheme to defraud defined by the Court. (Opinion, Appendix A, pages A6-A7). Quite simply, *but for* the mailings alleged in the indictment, Petlin and Horwich would not have obtained the monies to pay petitioner.

By abandoning any analysis of the specific connection between the fraud it defined and the precise mailings charged in the indictment, the Court concluded that *all* mail use involving any Safeway business with Mutual was connected to the scheme to get money and logically therefore *any* use of the mails satisfies the nexus requirement of the statute. Consequently, in the opinion of the Court of Appeals, in this case, every mailing involving, directly or indirectly, any of Safeway's business or affairs with Mutual, regardless of the nature of the material mailed, regardless of who mailed it or received it, and regardless of the circumstances of the mail uses, amounted to a felony

on the part of petitioner.[4] Additionally, the Court has charged to petitioner and declared a felony the conduct of a secretary or a billing clerk or cashier in mailing out, in the course of duty, the employer's lawful statements.[5] Resting on the premise that petitioner was paid pursuant to some type of formula or percentage based on Mutual transactions with Safeway, the Court's rationale overlooks the actual legitimate business conduct of both enterprises and further assumes that each Mutual offering to Safeway was established with petitioner's complicity. Neither the evidence adduced at trial nor the opinion of the Appellate Court precisely define any regular, ascertainable formula pattern of payment nor has any court identified any precise transaction tainted with the fraud defined in the decision. As pointed out in the dissenting opinion, no transaction alleged in the indictment has ever been linked by the evidence to petitioner. (Opinion, Appendix A, page A10)

Essentially, the Appellate Court has abandoned the specific counts of the indictment and has abandoned any analysis of the relationship of those uses of the mail to the specific conduct it has defined as fraudulent. The evidence did not establish that any count of the indictment, that is, any mail use, was connected to petitioner or to any activity of petitioner. Can his conviction for mail fraud be affirmed on the basis of mail use in connection with a legitimate offer to sell meat made up by Mutual in accord with market conditions and the desires of its client suppliers? Furthermore, can the conviction be affirmed on mail uses not connected to any payment to petitioner by Mutual?[6]

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4. In this context see *United States* v. *Brickey* (E. D. Arkansas, 1969) 296 F. Supp. 742, 749 wherein the Court stated it was "simply not prepared to go that far."

5. This was the analogy which the Court in *Parr* v. *United States* (1959) 363 U. S. 370, 386 "happily" was not called on to determine.

6. The last alleged payment by Petlin and Horwich to petitioner occurred on approximately August 25, 1974. (T. 134-136, 180, 209-211, 310, 318, 334-335, 351.) Petitioner was discharged by Safeway on February 20, 1975. (T. 76) In this context, five counts

(Footnote continued on next page.)

Mutual submitted innumerable offers to Safeway which were accepted and rejected by both petitioner and other buyers in his office. Would any Mutual offer not based on petitioner's disclosure of competitor offers or Safeway's anticipated future requirements (Point 1 of the Court's definition of the scheme), or petitioner's directing Mutual to specific suppliers allowing Mutual to offer a more competitive price (Point 2 of the Court's definition), or petitioner's rejection of offers similar in price and quantity to those tendered directly by suppliers and subsequently accepted when placed through Mutual (Point 3) properly be a basis for a mail fraud conviction? Additionally, can any of these elements be assumed? Mutual was in the meat brokerage business. Because many of its offers to Safeway were accepted by petitioner and others in his office does not thereby either establish or prove that any transaction was fraudulent. Clearly, if any Mutual offer does not rest on any element incident to the scheme defined by the Court, mail use in connection with that offer could not be in furtherance of any scheme. Stated differently, the evidence must specifically establish a direct link between each mailing alleged in the indictment and one or more elements of the fraud defined by the Court. In essence, the Appellate Court concentrated its attention on the supposed scheme to defraud and disregarded the specific mailings charged in the indictment that constitute the gist of offense.

The rationale presented by the Court that *but for* the mailings Mutual would not have obtained the monies to pay petitioner and that therefore Mutual was a conduit of funds for petitioner has been expressly rejected by other courts. While this rationale points out the link between the sales, the mailings and the payments to petitioner, it does not address

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(Footnote continued from preceding page.)
of the indictment charged mail use after the last payment was allegedly made to petitioner. Of these, one count charged mail use after petitioner was discharged. (Indictment, Appendix D, page A19, specifically counts 14 through 18.)

the crucial question whether the confirmations, brokerage statements and supplier checks alleged in the indictment were sent or received for the purpose of executing the scheme to defraud defined by the Court. *United States* v. *Tarnopol* (Third Circuit, 1977), 561 F. 2d 466, 472. The mailings charged in the indictment were initiated by Mutual, not by petitioner, and they represented a perfectly proper routine procedure in aid of the conduct of business between Mutual, Safeway and the suppliers. These mailings were intrinsically innocent, and indeed necessary, and there is otherwise no proof to establish that these mailings were in any way connected to any element of the scheme defined by the Court. *Tarnopol* at page 473. Not one of the mail uses charged in the indictment was fraudulent in itself or had any proximate connection with any disloyal or illegal activity. *United States* v. *Brickey* (E. D. Arkansas, 1969), 296 F. S. 742, 749-750.

In the instant case, mail use was conducted for a lawful purpose, that is, the legitimate business activity of the enterprises involved in buying and selling meat. None of the mailings alleged in the indictment contained any false representations nor were the proceeds of any scheme received through the mails. Crucially, the confirmations, brokerage statements and supplier checks complained of in the indictment constituted innocent mail use that was regularly employed to carry out a necessary or convenient procedure by legitimate businesses. These uses of the mail were not shown to be related to the fraud specifically defined by the Court even though petitioner was allegedly paid from the funds received through these mailings. *Parr* v. *United States* (1959) 363 U. S. 370, 389, 391; *Tarnopol* at page 472; *United States* v. *Beall* (N. D. California, 1954), 126 F. Supp. 363, 365-366. Mail use must be part of the execution of the scheme to defraud defined by the Court. *Kann* v. *United States* (1944) 323 U. S. 88, 95. At the very least, the specific relationship of each mail use alleged in the indictment to the fraud must be established. *United States* v. *Brown* (Third Cir-

cuit, 1978) 583 F. 2d 659, 668. Under the holding of the Court of Appeals in the case at bar, that precise connection is not legally required.

III.

THE ADMISSION IN A JURY TRIAL OF TESTIMONY OF PRIOR "BAD ACTS" OCCURRING TWELVE YEARS BEFORE TRIAL UNDER RULE 404(b) OF THE FEDERAL RULES OF EVIDENCE WAS IMPROPER AND SHOULD HAVE BEEN EXCLUDED UNDER RULE 403 OF THE FEDERAL EVIDENCE RULES.

In footnote 6 on page A7 of the opinion, the Appellate Court stated:

> As we view the scheme, it began *when Lea first proposed the arrangement* to Petlin and Horwich. (Emphasis added.)

Again on page A9, the Court stated:

> The testimony here at issue demonstrated that Lea had previously sought to establish a relationship with another meat broker similar to the relationship with Mutual.

Nothing in the testimony of either Petlin or Horwich supports these statements. The testimony of these witnesses indicated that the arrangement did not first begin with petitioner but rather with those witnesses or one of their silent partners. (T. 128-136, 308-310) Standing alone, this statement by the Court would not have much consequence. However, the Appellate Court's error underlines the inherent conflict between Rules 403 and 404(b) of the Federal Evidence Rules that cannot be resolved by mechanical application of the later Rule. Viewed in relation to the testimony of prior bad acts, this misstatement in the opinion underlines the impact of such testimony not only on the jury but also upon the Appellate Court. Clearly, the probative virtues of this evidence did not outweigh its prejudicial proclivities. With regard to the payments allegedly made to the petitioner, did the prosecution need additional evidence? This

testimony had no purpose other than prejudice. It ought not to have been allowed.

CONCLUSION.

Regretably, petitioner was found guilty of accepting money from Petlin and Horwich. His guilt was established by his avarice, his "other crimes" and moral corruption, not by any injury to Safeway or any use of the mails.

For the reasons hereinabove set forth, Petitioner prays that the Court grant his petition for a writ of certiorari.

Dated: April 22, 1980

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 79-1940

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOHN L. LEA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-CR-48—Bernard M. Decker, *Judge.*

ARGUED JANUARY 15, 1980—DECIDED FEBRUARY 19, 1980

Before CUMMINGS, WOOD, and CUDAHY, *Circuit Judges.*

WOOD, *Circuit Judge.* A jury convicted appellant Lea on twenty counts of engaging in a scheme to defraud within the meaning of the federal mail fraud statute. 18 U. S. C. § 1341.[1]

1. 18 U. S. C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any

(Footnote continued on next page.)

The principal ground upon which he appeals is that the government failed to establish a sufficient nexus between the scheme and the mailings that serve as the jurisdictional basis for prosecution under that statute.

I.

A. *Background*

Safeway Stores, Inc. (Safeway) employed Lea as manager of the meat buying department of its Midwest Buying Office.[2] In that capacity, Lea was responsible for the purchase at wholesale of fresh meat for ultimate sale in Safeway's retail food stores.

Standard operating procedure, to the extent relevant to this appeal, required that purchases be made using an offer and acceptance method. Safeway publicized specifications of its immediate needs, and interested suppliers or brokers promptly extended offers, usually by telephone. Negotiation tactics such as disclosure of a competing offer or indication of price relativity were strictly prohibted. The buyer accepted the most favorable offer by telephoning the supplier or broker and conveying a purchase order number. The original of the corresponding purchase order form was then mailed to the supplier or, where a broker conveyed the offer, to the broker. Safeway's corporate office, accounting department, and receiving warehouse each received copies, and the Midwest Buying Office retained one. Corporate headquarters received additional con-

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(Footnote continued from preceding page.)

post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. The Midwest Buying Office, one of four scattered nationwide, was originally located in Chicago but relocated to Prairie Village, Kansas in May 1971.

firmation each week when the Midwest Buying Office sent a form listing suppliers who extended offers, the details of each offer, accepted offers, and where relevant, intermediary brokers.

Safeway's corporate policy required that buyers abide by the wishes of the seller regarding whether to transact business directly or through a broker. Although the policy expressly forbade buyers from attempting to deal directly for the purpose of eliminating a broker's commission, Safeway encouraged buyers wherever possible, but within the constraints of the foregoing limitations, to deal directly with suppliers. Nationally, in an average year, Safeway purchased ninety-seven to ninety-eight percent of its carcass beef in transactions free of broker intervention.

B. *The Scheme to Defraud*

Allen Petlin and William Horwich were partners in a Chicago meat brokerage business known as Mutual Brokerage Service (Mutual). Initially, Mutual was unable to do any significant business with Safeway's Midwest Buying Office. That changed suddenly in late 1966 when Petlin and Horwich began paying kickbacks to Lea on orders that Mutual placed for its client suppliers.

Petlin or Horwich frequently telephoned Lea to convey offers to supply Safeway with carcass meat. During these conversations Lea would often divulge the content of Mutual's competitors' offers and Safeway's anticipated future requirements. Lea did not provide comparable information to any other broker or supplier. When necessary, Lea also directed Mutual to specific suppliers that Lea believed would allow Mutual to offer a more competitive price. Two suppliers offered further evidence of Mutual's favored status when they testified that Mutual contacted them shortly after they had tried unsuccessfully to do business directly with Lea. Offers similar in price and quantity to those tendered directly to and rejected by Lea were accepted when tendered through Mutual. Extreme pressure was thus

placed on suppliers to extend offers to Safeway only through Mutual.

Upon receipt of the purchase order form confirming acceptance, Mutual, as a matter of course, mailed confirmations of sale to the appropriate supplier and to the Midwest Buying Office. After delivery, Safeway sent payment directly to the supplier. Each month Mutual mailed to suppliers with whom they did business during the preceding month a brokerage statement listing commissions due and owing. Suppliers then mailed commission checks directly to Mutual. As far as Safeway was concerned, the broker effectively dropped out of the transaction upon receipt of the confirmation of sale. Commissions were a matter exclusively between supplier and broker. Safeway, however, remained interested in monitoring its buyers' use of brokers. Accordingly, standard operating procedure required that when a buyer consummated a transaction through a broker he make a notation to that effect on the purchase order form and the weekly cumulative form. Nevertheless, at Lea's direction, forms sent from the Midwest Buying Office to Safeway's corporate headquarters contained no indication of Mutual's involvement.

Mutual deposited suppliers' commission checks in a checking account at a Chicago bank and paid kickbacks to Lea from funds secured from the same account. The amount of each kickback was keyed to the volume of business that Mutual placed with Safeway. Over the eight-year duration of the scheme, Mutual earned $537,350 in commissions and kicked back $29,000 to Lea. During the same period, Mutual's share of Safeway's midwest carcass beef purchases increased from a few scattered sales to more than fifty percent.

II.

The government based its prosecution under the mail fraud statute on the theory that the foregoing constituted a scheme among Lea, Petlin, and Horwich to defraud Safeway of the

honest and faithful services of its employee, Lea.[3] *See United States* v. *Bush*, 522 F. 2d 641 (7th Cir. 1975), *cert. denied*, 424 U. S. 977 (1976); *United States* v. *George*, 477 F. 2d 508 (7th Cir.), *cert. denied*, 414 U. S. 827 (1973). Alleged to be in furtherance of the scheme were three kinds of mailings: (1) written confirmations sent by Mutual to suppliers confirming the sale of meat through Mutual to Safeway, (2) brokerage statements sent by Mutual to suppliers detailing charges for brokerage commissions on sales to Safeway, and (3) checks in payment of the brokerage commission charges sent by suppliers to Mutual.

Lea argues on appeal that the nexus between the mailings and the scheme to defraud Safeway is too attenuated to allow prosecution under the mail fraud statute. That Lea did not participate in any of the mailings does not preclude application of the statute. *See Pereira* v. *United States*, 347 U. S. 1 (1954). Section 1341 is applicable not only where one "places" an item in a mail depository but also where one "knowingly causes" a mailing. The Supreme Court has settled the question that a mailing is knowingly caused "[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even

3. Lea asserts that Safeway suffered no pecuniary loss and that therefore the mail fraud statute is inapplicable. We find no support in the record for this characterization of the facts, nor is there support in the case law for this characterization of the law. Two suppliers testified that the prices at which they offered and sold beef to Safeway were increased to cover the cost of Mutual's commission charges. One of these suppliers testified further that shortly after Lea rejected a direct offer from his supply company, Mutual contacted him and negotiated a sale to Safeway at a higher price. Even accepting for the moment Lea's dubious assumption that the foregoing does not establish pecuniary loss, the government's theory of prosecution cannot be assailed on this ground. The law in this circuit is that pecuniary loss is not an essential element of the crime of mail fraud. *United States* v. *Reicin*, 497 F. 2d 563, 571 (7th Cir.), *cert. denied*, 419 U. S. 996 (1974); *United States* v. *George*, 477 F. 2d 508, 512 (7th Cir.), *cert. denied*, 414 U. S. 827 (1973); *see United States* v. *Reid*, 533 F. 2d 1255, 1261 (D. C. Cir. 1976).

though not actually intended. . . ." *Id.* at 8-9. Here, the parties to the scheme contemplated that Mutual would generate substantial commissions on transactions between suppliers and Safeway and then pay kickbacks to Lea from these funds. Mutual's engagement in the ordinary business practices of a meat broker was therefore not only foreseeable but also essential to the scheme. Under *Pereira,* the only legal conclusion that can flow from these facts is that Lea knowingly caused the mailings that serve as the basis of his mail fraud conviction.

Notwithstanding the foreseeability of the mailings, Lea raises a number of subsidiary points that he asserts make the nexus between the mailings and the scheme too attenuated to satisfy the statutory requirement that the mailing be "for the purpose of executing such scheme." At the outset, we note that the government need not show that the mailing was an essential part of the scheme; the mail fraud statute requires only that the mailing be incident to an essential part of the scheme. *Compare id.* at 8, *with United States* v. *Maze,* 414 U. S. 395, 400 (1974). We held previously in *Ohrynowicz* v. *United States,* 542 F. 2d 715 (7th Cir.), *cert. denied,* 429 U. S. 1027 (1976), that a mailing satisfies this requirement where it is a normal concomitant of a transaction that is essential to the fraudulent scheme.

The basis of the mail fraud prosecution in *Ohrynowicz* was a "check-kiting" scheme,[4] in which the defendants opened checking accounts at a number of banks using fictitious names and addresses. All of the fraudulent transactions were carried out with the temporary nonpersonalized checks that the banks hand-delivered immediately upon opening the accounts. Consequently, the government instead relied on the printers' later mailings of the personalized checks that the banks routinely ordered for its

4. "Check-kiting," as its name implies, involves the floating of worthless checks between bank accounts containing insufficient funds. By taking advantage of the time lag necessary for clearance, participants temporarily may be able to conceal fraudulent cash withdrawals.

customers. These mailings, clearly not essential to the scheme,[5] were ordinary incidents of an essential element—the opening of checking accounts. We found that relation sufficient despite the fact that the items mailed were not instruments of the fraudulent scheme.

Our examination of the record in the case at bar reveals substantial evidence supporting the government's theory of a broad-based scheme to defraud among Lea, Petlin, and Horwich. By steering a major portion of Safeway's beef purchases to suppliers dealing through Mutual, the scheme established Mutual as a conduit for funds, some of which were kicked back to Lea. An indispensable element of the scheme was the use of Mutual as a broker through which to funnel Safeway's purchases. Mutual's mailings of confirmations and brokerage statements, and the suppliers' mailings of commission checks were normal concomitants of the brokerage transactions and were therefore incident to an essential element of the scheme.[6]

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5. The defendants probably would have preferred that the printers not mail the personalized checks since the only foreseeable consequence of those mailings was to facilitate the banks' discovery of the fraud.

6. Lea's restrictive definition of the parameters of the scheme serves as the basis for a number of his other assertions of error. He contends first that the government's reliance on mailings that occurred before the payments of kickbacks is not supportable under the mail fraud statute. Implicit in this argument is that the scheme did not begin until payment of the first kickback. As we view the scheme, it began when Lea first proposed the arrangement to Petlin and Horwich. Accordingly, none of the mailings alleged in the indictment occurred before commencement of the scheme.

The contention that five of the counts cannot stand because the mailings upon which they were based occurred after the last kickback is similarly without merit. Mutual's receipt of commissions on the last of the sales that it brokered had its roots in the preferential treatment accorded it by Lea. Since the payment of the last kickback did not mark the conclusion of the scheme, Lea's reliance on *United States* v. *Maze*, 414 U. S. 395 (1974), is misplaced.

Lastly, we reject Lea's argument that the government's failure to link specific kickbacks to specific mailings is fatal. Lea, Petlin, and Horwich devised a continuing scheme to defraud. The government satisfied its burden of showing the existence of a sufficient nexus between the mailings and the continuing scheme. Greater specificity is not required.

The relation between the scheme and the mailings here is even closer than that found sufficient in *Ohrynowicz*. In that case, though the mailing was incident to an essential element, the items mailed were at best superfluous to the success of the scheme. Here, the items mailed, though probably not absolutely essential to success, furthered the scheme. To obtain funds to pay the kickbacks, Mutual had to secure commission payments from the suppliers who sold to Safeway. In the ordinary course of business, the confirmations and commission statements facilitated receipt of the commission checks, which, after being deposited in Mutual's bank account, served as the source of funds for the payments to Lea.

We do not hold today that all kickback schemes may be prosecuted under the mail fraud statute merely because one of the participants uses or causes another to use the mails. The government must still show, as it did here, the requisite nexus between the scheme and the mailings relied upon to invoke the statute. But the existence of that nexus in a particular case should not be evaluated in a vacuum. Proper analysis demands at the threshold a close examination of the parameters of the scheme. Where that examination discloses that an essential element of the scheme is expansion of a legitimate business into nonlegitimate areas, mailings incident to the nonlegitimate activities may serve as the basis for prosecution under the mail fraud statute.

III.

Another Chicago-based meat broker testified that ten or twelve years before trial Lea offered to direct some of Safeway's meat purchases to him provided he kicked back a portion of the commissions earned on those purchases. The trial judge admitted that testimony for the purpose of showing motive and intent. Rule 404(b) of the Federal Rules of Evidence authorizes the admission of evidence of "bad acts" for this limited purpose when its probative value outweighs its prejudicial effect. *United States* v. *Weidman*, 572 F. 2d 1199, 1202-03 (7th Cir.),

cert. denied, 439 U. S. 821 (1978). The necessary balancing is left to the sound discretion of the trial judge. *See United States* v. *Jones,* 438 F. 2d 461, 465 (7th Cir. 1971). Although not the exclusive indicia of probativeness, the prior act must be "similar to the offense charged and close enough in time to be relevant." *United States* v. *Fierson,* 419 F. 2d 1020, 1022 (7th Cir. 1969). The testimony here at issue demonstrated that Lea had previously sought to establish a relationship with another meat broker similar to the relationship with Mutual. Further, the testimony related to a meeting that occurred no later than two years after commencement of Lea's relationship with Mutual.

We recognize that admission of evidence of prior "bad acts" is always prejudicial. However, under these facts, there has been no showing that the trial judge's decision to admit the evidence was an abuse of discretion.

IV.

We have considered Lea's remaining contention—that the trial court improperly instructed the jury on the weight to be given the testimony of witnesses testifying under grants of immunity—and find that it lacks merit.[7] *See United States* v. *Demopoulos,* 506 F. 2d 1171, 1179-80 (7th Cir. 1974), *cert. denied,* 420 U. S. 991 (1975). AFFIRMED.

7. The trial judge read the following instruction:

The witnesses, Allen Petlin and William Horwich, testified under a grant of immunity, pursuant to a court order, after a petition by the government was filed requesting such an order. Under the law, none of the testimony during this trial can ever be used against them in any subsequent criminal proceeding. However, if any one of them testified untruthfully under this grant of immunity, he could be prosecuted for perjury or the making of a false statement even though he was testifying under a grant of immunity.

The testimony of a witness who provides evidence against a defendant for immunity from prosecution, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the witness' testimony has been affected by interest, or by prejudice against defendant.

CUDAHY, *Circuit Judge*, dissenting. I agree that each kickback payment need not be related to a specific shipment of meat (or the mailings pertaining to it). I do think, however, that all the shipments of meat (and related documents), furnishing the basis of the indictment, must have arisen from a transaction in which Lea participated. The government as much as conceded that the latter relationship was not affirmatively and specifically established. For example, the government asserts at pp. 24-25 of its brief:

> "Further, even if a Mutual offer was accepted by an employee other than Lea, that fact by itself would not remove the transaction from the fraudulent scheme. Mutual's offer would nonetheless have been formulated with the benefit of knowledge of competitor's prices improperly given by Lea in violation of company policy. In addition, the suppliers were compelled to make their offers through Mutual by their inability to do business directly with Lea."

The facts assumed by these arguments are unclear. A "nexus" based on such dubious arguments is insufficient. I respectfully dissent.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B.

Opinion by Judge Wood
Judge Cudahy dissenting

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 19, 1980

Before

Hon. Walter J. Cummings, *Circuit Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*
Hon. Richard D. Cudahy, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-1940 *vs.*	No 79-CR-48
JOHN L. LEA, *Defendant-Appellant.*	Bernard M. Decker, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this court filed this date.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 24, 1980

Before

Hon. Walter J. Cummings, *Circuit Judge*
Hon. Harlington Wood, Jr., *Circuit Judge*
Hon. Richard D. Cudahy, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-1940 *vs.*	No 79-CR-48
JOHN L. LEA, *Defendant-Appellant.*	Bernard M. Decker, Judge.

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and a majority of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Filed Jan. 23, 1979

UNITED STATES OF AMERICA		
vs.	}	No. 79 CR 48
JOHN L. LEA		

Violation: Title 18, United States Code, Section 1341

The Special November 1978 Grand Jury charges:

1. At all times material herein, Safeway Stores Incorporated and its divisions, hereinafter referred to as Safeway, was a corporation which sold retail meat and groceries throughout the United States.

2. At all times material herein, John L. Lea was employed as a manager and purchasing agent in the meat buying department, Midwest Branch, of Safeway, and in said capacity obtained, purchased and bought fresh beef and various other meat food products used in the operation of Safeway.

3. At all times material herein, Mutual Brokerage Service, Inc., hereinafter referred to as Mutual, was a corporation doing business in the Northern District of Illinois and elsewhere, which served as a broker in the sale of meat food products by various meat suppliers to safeway.

4. At all times material herein, William Horwich and Allen Petlin were stockholders and operating managers of Mutual.

5. At all times material herein, Kansas Beef Industries, Inc., commonly known as KBI, was a meat supplier engaged in the business of purchasing and slaughtering live animals and selling fresh beef and meat food products.

6. At all times material herein, E. W. Kneip, Inc., commonly known as E. W. Kneip, was a meat supplier engaged in the business of purchasing and slaughtering live animals and selling fresh beef and meat food products.

7. At all times material herein, B & B Packing Co., commonly known as B & B, was a meat supplier engaged in the business of selling fresh beef and meat food products.

8. At all times material herein, Central Meat Co., commonly known as Central Meat, was a meat supplier engaged in the business of selling fresh beef and meat food products.

9. At all times material herein, Rochester Independent Packer, Inc., commonly known as RIPCO, was a meat supplier engaged in the business of purchasing and slaughtering live animals and selling fresh beef and meat food products.

10. At all times material herein, Aurora Packing Co., commonly known as Aurora, was a meat supplier engaged in the business of purchasing and slaughtering live animals and selling fresh beef and meat food products.

11. Beginning in or about 1965, and continuing thereafter up to and including March 1975, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

JOHN L. LEA

defendant herein, Wililam Horwich and Allen Petlin, not named as defendants herein, and others to the Grand Jury unknown, did unlawfully, wilfully and knowingly devise and intend to devise a scheme and artifice to defraud Safeway of the following:

(a) Its right to have the company's business and affairs conducted honestly, impartially, free from deceit, craft,

trickery, corruption, fraud, undue influence, dishonesty, and conflict of interest;

(b) Its right to the conscientious, loyal, honest, faithful, disinterested and unbiased services, decisions, actions and performance of duties by defendant John L. Lea, in his capacity as manager and purchasing agent, free from corruption, partiality, wilful omission, bias, dishonesty, misconduct, conflict of interest and fraud;

(c) Certain secret profits obtained by defendant John L. Lea in the performance of his official duties for Safeway.

12. It was part of said scheme and artifice to defraud that William Horwich and Allen Petlin of Mutual contacted and caused to be contacted the various meat suppliers named in paragraphs five through ten of this indictment, hereinafter referred to as meat suppliers, and advised and caused them to be advised that Safeway was interested in purchasing fresh beef and meat food products from them.

13. It was further a part of said scheme and artifice to defraud that defendant John L. Lea would and did place and cause to be placed, on behalf of Safeway, orders to purchase fresh meat and meat food products.

14. It was further a part of said scheme and artifice to defraud that Mutual would and did represent, as brokers, the meat suppliers for which purchase orders were issued and caused to be issued by defendant John L. Lea.

15. It was further a part of said scheme and artifice to defraud that Mutual issued and caused to be issued confirmations of sale evidencing the sales of fresh beef and meat food products by the meat suppliers to Safeway.

16. It was further a part of said scheme and artifice to defraud that the meat suppliers would and did deliver fresh beef and meat food products to various divisions of Safeway for which meat suppliers issued and caused to be issued invoices to said

divisions of Safeway for the sale of said fresh beef and meat food products.

17. It was further a part of said scheme and artifice to defraud that the division of Safeway purchasing fresh beef and meat food products would and did issue and caused to be issued checks to meat suppliers in payment for the delivery of fresh beef and meat food products.

18. It was further a part of said scheme and artifice to defraud that Mutual would and did issue and cause to be issued brokerage statements to meat suppliers for brokerage commissions on fresh beef and meat food products sold by meat suppliers through Mutual to Safeway.

19. It was further a part of said scheme and artifice to defraud that the meat suppliers would and did issue and cause to be issued checks to Mutual in payment of brokerage commissions for fresh beef and meat food product sales by the meat suppliers to Safeway.

20. It was further a part of said scheme and artifice to defraud that William Horwich and Allen Petlin, of Mutual, would and did pay and cause to be paid monies and kickbacks to defendant John L. Lea: the amount of monies and kickbacks paid were based on fresh beef and meat food product sales brokered by Mutual, for the meat suppliers Mutual represented on sales made to defendant John L. Lea, acting as purchasing agent for the meat buying department, Midwest Branch, Safeway.

21. It was further a part of said scheme and artifice to defraud that defendant John L. Lea, in order to perpetrate the scheme, conceal its existence, and to continue to receive the payments and kickbacks described above, would and did sign a conflict of interest agreement with Safeway falsely representing that he had not received any gift or gratuity of any kind from a meat supplier's reprsentative or any concern or individual doing business or seeking to do business with Safeway.

22. It was further a part of said scheme and artifice to defraud that defendant John L. Lea would and did fail to disclose to Safeway the fact that as an employee of Safeway, acting in the capacity of purchasing agent, he was deriving monies and kickbacks, which he converted to his own use and benefit, as a result of business conducted by him, on behalf of Safeway.

23. It was further a part of said scheme and artifice to defraud that defendant John L. Lea would and did continue to represent to Safeway that defendant John L. Lea was an employee, honest and loyal to the best interests of Safeway, and that said defendant would and did fail to disclose the conflict of interest and disloyalty of defendant John L. Lea in acting on behalf of Safeway in their dealings with Mutual and meat suppliers represented by Mutual.

24. On or about the dates listed below in the Northern District of Illinois, Eastern Division and elsewhere,

defendant herein, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly and wilfully:

a. Placed and caused to be placed the envelopes listed below in the United States mails to be sent and delivered according to the directions thereon by the United States Postal Service, each such use of the mails being a separate count of this indictment:

Count	Sender/Contents	Addressee	Date of Mailing On or About
1	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	E. W. Kneip 7501 Brown Street Forest Park, Illinois	In or about February 1974
2	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Rochester Independent Packers, Inc. 11 Independence Street Rochester, New York	In or about February 1974
3	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Aurora Packing Company 211 New York Street Aurora, Illinois	In or about March 1974
4	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Confirmation # 26418)	Central Meat Company 824 W. 38th Place Chicago, Illinois	March 4, 1974
5	Central Meat Company 824 W. 38th Place Chicago, Illinois (Packer Check # 06338)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645	April 5, 1974
6	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Kansas Beef Industries, Inc., Kansas Packing Division 406 E. 21st St. Wichita, Kansas	In or about May 1974
7	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Confirmation # 26680)	Safeway Meat Buying Department, Midwest Branch 2310 W. 75th Street Prairie Village, Kansas	April 30, 1974
8	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	E. W. Kneip 7501 Brown Street Forest Park, Illinois	In or about May 1974
9	E. W. Kneip 7501 Brown Street Forest Park, Illinois (Packer Check)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645	On or about June 5, 1974

Count	Sender/Contents	Addressee	Date of Mailing On or About
10	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Rochester Independent Packers, Inc. 11 Independence Street Rochester, New York	In or about August 1974
11	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Confirmation # 26978)	Safeway Meat Buying Department, Midwest Branch 2310 W. 75th Street Prairie Village, Kansas	July 2, 1974
12	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Kansas Beef Industries, Inc., Excel Division 900 E. 21st Street Wichita, Kansas	In or about August 1974
13	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Confirmation # 26946)	Safeway Meat Buying Department, Midwest Branch 2310 W. 75th Street Prairie Village, Kansas	June 24, 1974
14	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Central Meat Company 824 W. 38th Place Chicago, Illinois	In or about September 1974
15	Central Meat Company 824 W. 38th Place Chicago, Illinois (Packer Check # 07251)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645	September 6, 1974
16	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Confirmation # 27357)	Safeway Meat Buying Department, Midwest Branch 2310 W. 75th Street Prairie Village, Kansas	September 25, 1974
17	B & B Packing Company 4404 W. Berteau Chicago, Illinois (Packer Check # 26473)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645	In or about January 1975
18	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645 (Brokerage Statement)	Rochester Independent Packers, Inc. 11 Independence Street Rochester, New York	In or about March 1975

b. Caused the envelopes listed below to be delivered according to the directions thereon by the United States Postal Service, each such use of the mails being a separate count of this indictment:

Count	Sender/Contents	Addressee	Date of Delivery On or About
19	Rochester Independent Packers, Inc. 11 Independence Street Rochester, New York (Packer Check # 02588)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois 60645	February 5, 1974
20	Rochester Independent Packers, Inc. 11 Independence Street Rochester, New York (Packer Check # 04980)	Mutual Brokerage Service, Inc. 5875 No. Lincoln Avenue Chicago, Illinois	July 5, 1974

All in violation of Title 18, United States Code, Section 1341.

A True Bill:

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Foreman

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United States Attorney

PCP:df